FILE COPY.

Office Supreme Court, U. S.
FILED
MAY 21 1908
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

In Equity. Original, No. 2

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

ON THE MOTION OF DEFENDANT TO MODIFY THE ORDER OF REFERENCE.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

HOLMES CONRAD,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

In Equity. Original, No. 4.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

ON THE MOTION OF DEFENDANT TO MODIFY THE ORDER OF REFERENCE.

The complainant, by her counsel, respectfully objects to the modifications proposed by the defendant to the order of reference, and for grounds of objection indicates the following, viz:

(1) The order of reference directs the master to ascertain and report:

> "2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863," &c.

The proposed modification of this section is as follows, viz:

> "The territorial area and *assessed* valuation of the States of Virginia and West Virginia June 20, 1863."

The inquiry should not be restricted to the *assessed* value of the territory, but should be allowed to embrace every reasonable and proper means of ascertaining the actual value of all of the elements of wealth that together made up the value of the State. When one State is spoken of as wealthier than another, reference is not had to the *assessed* valuation of the lands, but to all of the resources of the State which are available for producing revenue.

The elements of wealth of West Virginia, even between January, 1861, and June, 1863, were the *coal,* the *oil,* the *gas,* and the *hardwoods,* which then as now abound throughout its eastern half. These elements of wealth have no place in the assessments for taxation which existed at the dates named. The assessments of land were made in Virginia every ten years. The assessment next preceding January, 1861, and June, 1863, was made in 1856, and manifestly affords no just ground for ascertaining the relative values of the two States as a basis on which the common public debt may justly or equitably be apportioned between these States.

In this connection we may say that there is now before us a copy of the official Report of the Auditor of Virginia, giving in tabulated form exact and full statements of the area and *assessed* value of each of the counties in the old State, of the lots in each of the cities and towns, and the value of all the personal property within the limits of the State. These tables of statistics, occupying nearly seven hundred pages of closely printed matter, give all the information that can be desired as to the *assessed valuation* of the real and personal property within the State in the years 1860 and 1861. But this apportionment of the common liability of the two States for the public debt should not and cannot equitably be made on the basis of the *assessed* values of the property of the States, because the assessed value was not in any case intended to express the actual value. Indeed, it was not intended to be more than two-thirds of the actual value of the property.

The assessment of 1856 did not embrace any of the elements of wealth which since 1861 have formed the principal basis of the wealth of the counties forming the State of West Virginia.

(2) It is proposed to modify the third paragraph of the order of reference by adding to it, at the end, the words "prior to January 1, 1861," the effect of which would be to direct that, even although the Commonwealth of Virginia had expended money within the territory now constituting West Virginia since the first of January, 1861, and prior to June 20, 1863, she should not be credited therewith in this account. Why not?

The "restored State of Virginia" had no existence prior to July, 1861, and then only to a limited extent and for certain purposes; but even that phantasm of a State, although "what seemed its head the likeness of a kingly crown had on," yet in time, when it had served its purpose, it faded back into the name and body of the present Commonwealth of Virginia. So it would seem to be but just that if Virginia had at any time prior to the creation of West Virginia expended money within these western counties, and West Virginia reaped the benefit of it, she should be made to account for it.

(3) The fourth paragraph of the order of reference provides as follows, viz:

> "4. Such proportion of the ordinary expenses of the government of Virginia, since any of the debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia, on the basis of the average to the population of Virginia, with and without slaves, as shown by the census of the United States."

Defendant proposes to modify this as follows, viz:

> "The ordinary expenses of the government of Virginia, since any of said debt was contracted, *and*

> *prior to January 1, 1861,* on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States."

As stated, the proposed modification, standing alone, is unintelligible. The object of the inquiry is to ascertain what proportion of the ordinary expenses of the State government should be charged to the counties now forming West Virginia.

The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made.

(4) Paragraph 5 of the order of reference is as follows, viz:

> "5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

Defendant asks to modify as follows, viz:

> "5. And also on the basis of the *assessed valuation* of the property, real and personal, by counties, of the State of Virginia during the same period."

We have already called attention to this attempt to restrict the inquiry to the assessed valuation, in commenting upon the proposed modification to paragraph No. 2. The assessed value of real property never exceeded two-thirds of its market value, and, as appears from the Auditor's Report of 1860 and 1861, the assessments of all lands in Virginia were made in 1856, and none later than that date. This assessment did not embrace, as distinct subjects of valuation, coal, or gas, or oil, or hardwoods, which constitute the basis of the large wealth of West Virginia. These all existed in 1861, and

their presence was considered in estimating the value of land in transactions between vendor and vendee. Oil was produced in immense quantities in 1862, and was prepared for market at the town of Elizabeth, in West Virginia, in that year. These elements of wealth and value would have been taken into account in any proceeding for partition between joint owners, but were not considered in assessment for taxation.

From 1861 to 1865 West Virginia was the seat of war; few, if any, actual transactions of sale of lands took place, and no normal standard of valuation existed. The difficulties are great enough in the way of reaching the actual values of land in that State during that period without adding the inequitable standard of assessment for taxation.

(5) Paragraph 6 of the order of reference provides as follows, viz:

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The defendant proposes to modify this section as follows, viz:

> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the said period and prior to January 1, 1861."

That is, the defendant wishes to limit the period within which the Commonwealth should be charged with moneys received from the western counties to the 1st of January, 1861, while the court would extend that period to June 20, 1863. As we do not think that either date will make any difference in the account, we leave this matter to the court.

Defendant, in proposing the names of gentlemen from which a selection may be made by the court of a special master to state the account in this cause, has found it needful to advise the court that it has deemed it right not to consider any citizen of centers where "West Virginia certificates" are owned, or sold, or traded in, and then it proceeds to nominate Mr. Charles E. Littlefield, of Maine.

We state for the information of the court that one of the largest certificate-holders who has made himself known to us during this litigation is a good citizen of the State of Maine. The two gentlemen named by defendant are altogether unimpeachable personally. We would not have nominated them because Mr. Littlefield lives so far away from the counsel and from the records from which all the information required is to be had, and because Mr. John W. Yerkes is at present a member of the firm of Hamilton, Yerkes & Colbert, who are the counsel for the Baltimore and Ohio Railroad Co., which is the largest taxpayer in West Virginia, contributing, as we are advised, one-eleventh of the taxes paid into the treasury. It has, therefore, a large interest in reducing the burdens which may rest upon that State and thereby lead to an increase of taxation.

On behalf of the Commonwealth of Virginia, we announced to counsel for West Virginia our purpose to present to the court the name of Mr. John Prentiss Poe, of the city of Baltimore, but were informed by them that Mr. Poe was counsel in a chancery cause of Maryland *v.* West Virginia, pending in this court, and was on that account ineligible. In this we concurred at the moment, but have since learned from unquestionable sources that Mr. Poe did file such a bill in his official character of Attorney General of Maryland, but that since the expiration of his term of office, now many years ago, he has been in nowise concerned in the cause. We therefore add his name to those already presented, and say that Mr. Poe is a graduate of Princeton, some time a bank clerk, and since 1858 a lawyer of recognized standing

n the courts of Maryland and its neighboring States, and or many years a counsellor on the rolls of this court. He s the author of the standard works of Law and Equity ractice in Maryland and was some time the Attorney Gen-ral of that State.

WILLIAM A. ANDERSON,
Attorney General of Virginia.

I concur in the above.

HOLMES CONRAD,
Of Counsel.

MAY 19, 1908.